

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JAMES HAYDEN,

Plaintiff,

v.

2K GAMES, INC. and TAKE-TWO  
INTERACTIVE SOFTWARE, INC. ,

Defendants.

CASE NO. 1:17-cv-02635-CAB

**DECLARATION OF ALFREDO BRODY IN SUPPORT OF DEFENDANTS TAKE-TWO  
INTERACTIVE SOFTWARE, INC. AND 2K GAMES, INC.'S  
MOTION FOR SUMMARY JUDGMENT**

I, Alfredo Brody, declare as follows:

1. I am the Vice President, Head of Global Sports Marketing at 2K Games, Inc. As part of my role at Take-Two Interactive Software, Inc., I was a key participant in the marketing and development of the National Basketball Association (“NBA”) basketball simulation video games at issue in this litigation (“*NBA 2K*”). I submit this declaration in support of Defendants Take-Two Interactive Software, Inc. and 2K Games, Inc.’s (together, “Take-Two”) motion for summary judgment.

**I. The Creation of *NBA 2K***

2. Take-Two is responsible for the development, creation, branding, licensing, and marketing of *NBA 2K16*, *NBA 2K17*, *NBA 2K19*, *NBA 2K20*, and *NBA 2K Mobile*. *NBA 2K* is a series of basketball simulation video games that was first released by Take-Two in 1999. Since then, Take-Two has continuously updated the game with a new version each year.

3. We designed *NBA 2K* to simulate professional NBA basketball as realistically as possible. Users of *NBA 2K* can play against a computer by themselves, against other users at home, or against users via the Internet. In each game, users can dribble, pass, block, shoot, and score just like they would in a real game of basketball. As in any game of basketball, the goal is to outscore the opponent to win the game.

4. At Take-Two, we have invested a substantial amount of time and energy to ensure the accuracy of the game, and we tried to include in the game as many elements as possible that emulate a televised NBA basketball game. For instance, the NBA basketball teams available in each version of *NBA 2K* change from year-to-year to track roster changes in the NBA, such as trades, retirements, and new players getting drafted. The NBA players in *NBA 2K* are also regularly updated to ensure that their skill level matches that of the corresponding real-life player. Each basketball game in *NBA 2K* has realistic courts, referees, crowds, and other visual

elements that make it look like a televised NBA basketball game. *NBA 2K* also includes realistic auditory components, including realistic announcers and sportscasters, cheering crowds, buzzers, and other elements meant to make the game sound like a televised NBA basketball game.

5. There are over 400 current and retired real-world NBA players featured in each *NBA 2K* game. To ensure that each of the players in the game looks exactly like he does in real life, we used advanced technology to replicate the NBA players precisely, including their height, build, hair, skin, facial features, and tattoos. To help us with this process, we hired Pixelgun Studio (“Pixelgun”), a photography and 3D scanning company. Pixelgun helped us “scan” the NBA players into *NBA 2K* using “photogrammetry.” Photogrammetry involves simultaneously taking hundreds of digital photos of a basketball player’s body from different angles and compiling them together to create a “texture map,” or “skin.” Software is then used to wrap the skin around a three-dimensional model of the player’s body.

6. An image of the Pixelgun booth in which players (below, Mr. James) are scanned into *NBA 2K* using photogrammetry is shown below:



7. Because photogrammetry uses hundreds of photographs to create the players’ skin textures, the NBA players who appear in *NBA 2K* look photorealistic, similar to what would be captured by a digital camera. They have the same physical build, height, hair, facial features,

skin, and tattoos, among other identifying features, that they have in real life. They also wear the same uniforms that they wear during real NBA games, including the same jersey number.

8. NBA players have been depicted in *NBA 2K* with the tattoos that they have in real life since at least as early as 2001, with the release of *NBA 2K2*.

## **II. The NBA Players' Appearance in *NBA 2K***

9. Three of the NBA basketball players who appear in *NBA 2K* are Danny Green, LeBron James, and Tristan Thompson (the “NBA Players”). I understand that this case relates to Plaintiff James Hayden’s copyright claim concerning six tattoos inked on the NBA Players in real life (the “Tattoos”), which also appear on the NBA Players’ bodies in *NBA 2K*.

10. The NBA Players granted the NBA and the NBAPA the right to license their likenesses to third parties, and the NBA and NBAPA in turn granted Take-Two a license to use the NBA Players’ likenesses in *NBA 2K*. Each of the NBA Players was voluntarily scanned into *NBA 2K* using the process of photogrammetry. Messrs. Green, James, and Thompson have been in *NBA 2K* with their Tattoos since at least as early as *NBA 2K11*, *NBA 2K14*, and *NBA 2K15* respectively.

11. Like the many other elements of *NBA 2K* that reflect real world NBA basketball, the Tattoos were included in *NBA 2K* to make the game look as realistic as possible, as *NBA 2K* is a basketball simulation game. Whenever the Tattoos appear in *NBA 2K*, they only appear on the NBA Players. There are virtually endless combinations of teams and players that a user can choose, such that a user can play *NBA 2K* without ever selecting to play a team that includes the NBA Players whose tattoos are in dispute here. Therefore, it is possible to play *NBA 2K* without Messrs. Green, James, and Thompson and their Tattoos ever appearing at all.

12. In *NBA 2K Mobile*, users need to obtain a collectible card of a particular NBA player to play as that person. Cards are obtained by earning awards in the game. That means

that many users will never be able to play as Messrs. Green, James, and Thompson, because they do not have or cannot get their cards. Mr. James in particular is a rare card in *NBA 2K Mobile*, and difficult to obtain.

13. Even when the NBA Players do appear in *NBA 2K*, their Tattoos are not observable. Two of the Tattoos, one on Mr. James' chest and the other on Mr. Thompson's chest, are not visible, as they are covered up by the NBA Players' jerseys. I understand that Plaintiff has included in his complaint the below close-up images of Mr. James and Mr. Thompson from *NBA 2K*. As you can see, even in Plaintiff's images, the tattoos are covered up by the jerseys, such that you cannot make out their designs. Moreover, these images are cropped and zoomed in, and therefore not typical of how you would see these players in action.



**LeBron James**



**Tristan Thompson**

14. The remaining four Tattoos are very difficult to pick out because (a) some of the Tattoos are faded or blurred and mixed with other tattoos; (b) some Tattoos are on parts of the body that are difficult to observe, such as the inner arm; (c) there is a mass of other visual features shown on screen, such that the Tattoos are difficult to observe; (d) the NBA Players are often moving amongst other players and their Tattoos may be blocked by the figures of other players and referees; (e) the NBA Players' Tattoos are hard to see as the players move fast across the court as they play basketball; (f) the NBA Players and, by extension, their Tattoos appear much smaller in *NBA 2K* than they do in real life; and (g) the camera is often far away from the

NBA Players so that the user can see most of the basketball court during gameplay, making it impossible to see a tiny tattoo.

15. To elaborate, as I mentioned above, *NBA 2K* is designed to mimic a televised NBA game as much as possible. In a typical basketball game within *NBA 2K*, ten basketball players appear on screen at once. The length of a quarter in *NBA 2K* is short, mere minutes. There are rare instances during a basketball game where the camera may show just one player, such as for an instant replay, but those instances are infrequent and last for only a few seconds. The point of a basketball game in *NBA 2K* is for users to control different players and have them pass the ball, set up shots, and score points. In order to play the game and actually score, users need to see multiple basketball players at once, as they would watching the game on television, which would make it highly unlikely that a user would be able to discern a player's tattoos.

16. Any given physical attribute of an NBA Player has relatively limited visibility in *NBA 2K*. As a game of basketball in *NBA 2K* progresses, the camera shifts to follow the action, focusing on different players as they dribble, pass, shoot, and block. The Tattoos are not relevant to the action of a basketball game, and very often will be out of focus, blurry, blocked by other players, or simply out of frame. The NBA Players also look a lot smaller in *NBA 2K* than they do in real life. A typical view of an *NBA 2K* basketball game showing multiple players playing is below:



17. Even when you play the game on a television monitor via a game console, the NBA Players are smaller on screen than they are in real life, their Tattoos are correspondingly smaller. When a user plays on smaller screens, such as a phone or laptop, the NBA Players and their Tattoos are even smaller. Unsurprisingly, given the difficulty seeing the Tattoos in *NBA 2K*, I am not aware of a single consumer who purchased *NBA 2K* for or because of the Tattoos in this case, let alone tattoos in general.

18. In light of all of the different elements in *NBA 2K*, the overall size of the game is large. In particular, *NBA 2K16* contains about 50 GB of data and has about a 53 GB playable size on day one with a required patch. *NBA 2K17* has about 50 GB of data and has about a 55 GB playable size on day one with a required patch. *NBA 2K18* has about 50 GB of data and about 55 GB playable size on day one with a required patch. *NBA 2K19* has about 50 GB of data and has about a 55 GB playable size on day one with a required patch. *NBA 2K20* has about 50 GB of data and about a 60 GB playable size on day one with a required patch. *NBA 2K Mobile* has about 1.6 GB of data. The Tattoos, which are included in texture files for the torso and arm area for the NBA Players, are a tiny fraction of the file size of each of these games. For *NBA 2K16* through *NBA 2K20*, the upper bound of the texture file size for the torso and arm area of

the NBA Players is only 2,730 KB. In *NBA 2K Mobile* it is even smaller, at a mere 240 KB. Thus, the maximum size of each texture file is at most 0.00515% of the playable computer program in *NBA 2K16–2K20*  $((2,730 \text{ KB} \div 53 \text{ GB}) * 100)$ . The texture files are also at most 0.015% of the playable computer program in *NBA 2K Mobile*  $((240 \text{ KB} \div 1.6 \text{ GB}) * 100)$ .

19. To show the difficulty in observing, much less identifying, the Tattoos in *NBA 2K*, I am attaching to this declaration some video recordings of *NBA 2K* gameplay. Attached hereto as **Exhibits A-H**, respectively, are video recordings of *NBA 2K16*, *NBA 2K17*, *NBA 2K18*, *NBA 2K19*, *NBA 2K20*, and *NBA 2K Mobile*.

### **III. Take-Two and Other Media Companies Would Be Harmed if Plaintiff Prevails**

20. Because Take-Two is not in the tattooing business and does not ink tattoos on people, Plaintiff and Take-Two are not competitors.

21. Although Take-Two has had players with the tattoos that they bear in real life in *NBA 2K* since at least as early as 2001, Mr. Hayden is the first tattooist to have ever demanded payment for tattoos in *NBA 2K*.

22. If Mr. Hayden prevails in this lawsuit, it would create a significant restriction on Take-Two's (and the rest of the video game industry's) ability to make realistic video games that accurately depict real people. This would also negatively impact other industries that depict real people, such as the film, television, and photography industries. Companies that want to depict tattooed people would need to negotiate with each tattooist for each tattoo, which they may be unable or unwilling to do. This would require identifying and tracking down hundreds, possibly thousands, of tattooists, a herculean task, particularly for individuals who have many tattoos and who may not remember all of their tattooists over the years. Some tattoos may have been inked




decades ago, and tracking those individuals down might be impossible. Tattooists could have changed tattoo parlors, retired, gone out of business, or passed away.

23. As a result, it may be impossible to identify all of the tattooists, much less negotiate with them. Even if they were identified, if a tattooist refused to license the depiction of a tattoo in the video game, we could be completely stymied from achieving our goal of creating a realistic simulation of NBA basketball. And other media, like television, film, and photography, would likely face the same hurdles and be similarly stymied in their representation of real tattooed persons. Such a system is untenable and would have drastic consequences for companies creating photorealistic products.

24. Moreover, people who would ordinarily expect to be able to license their image on their own terms would essentially cede control over their own image to a tattooist with whom they may have spent a mere hour of time. If Plaintiff is successful, it would hinder not only these basketball players, but also any tattooed person, who will suddenly lose control over their own bodies. People who get tattoos to express themselves would suddenly be unable to show them confidently, or allow others to depict them with their tattoos, without fear that a tattooist might cry copyright infringement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21 day of October, 2021.

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# **EXHIBIT A**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K16 Gameplay**

# **EXHIBIT B**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K17 Gameplay**

# **EXHIBIT C**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K18 Gameplay**

# **EXHIBIT D**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K19 Gameplay**

# **EXHIBIT E**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K20 Gameplay**

# **EXHIBIT F**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K Mobile Gameplay,  
Danny Green**

# **EXHIBIT G**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K Mobile Gameplay,  
LeBron James**



# **EXHIBIT H**

**PHYSICAL EXHIBIT TO BE FILED  
WITH THE CLERK**

**NBA 2K Mobile Gameplay,  
Tristan Thompson**